TO THE COURT OF CRIMINAL APPEALS:

Mr. Jones responds to the State's latest brief (filed by the Office of the Attorney General under the guise of an amicus brief) and addresses the Beaumont Court of Appeals's unpublished opinion in *Ex parte Lopez*[1] as follows.

THE BEAUMONT COURT REWRITES THE STATUTE.

The Beaumont Court in *Lopez* adds a nonexistent "not of public concern" element to section 21.16(b),[2] thus rewriting the law in an attempt to conform it to constitutional requirements, "a serious invasion of the legislative domain."[3]

> A Texas court has a duty to employ, if possible, a reasonable narrowing construction in order to avoid a constitutional violation, but such a construction should be employed only if the statute is readily susceptible to one.[4]

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[1] *Ex parte Lopez*, No. 09-17-00393-CR, 2019 WL _____ (Tex. App.—Beaumont, March 14, 2019, no pet. hist.)

[2] *Ex parte Lopez*, No. 09-17-00393-CR, 2019 WL _____, at *13.

[3] *State v. Doyal*, ___ S.W.3d. ___, PD-0254-18, 2019 WL 944022, at *10 (Tex. Crim. App. Feb. 27, 2019).

[4] *Ex parte Perry*, 483 S.W.3d 884, 903 (Tex. Crim. App. 2016).

When a court rewrites a statute, "the public at large [is not] on notice that the law means something other than exactly what it says."[5] The words of section 21.16(b) are broad but not ambiguous. They are not susceptible to a narrowing construction. They lead to an unconstitutional result, but not an absurd one.

Section 21.16 is directed at the privacy expectations of the subject of the image, and those expectations neither affect nor are affected by whether the image is of public concern.

Nor is the constitutionality of the publication of an image affected by whether the image is of public concern. The Supreme Court has never held that speech loses its protection because it is not of public concern. To the contrary, the Court has repeatedly rejected restrictions on speech without regard to whether the speech is of public concern.[6] Even if the Beaumont Court's rewrite were permissible, it would not save the statute.

NOBODY CAN DESCRIBE THE STATUTE'S LEGITIMATE SWEEP.

> From 1791 to the present … the First Amendment has permitted restrictions upon the content of speech in a few limited **areas**, and

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[5] *State v. Johnson*, 475 S.W.3d 860, 872 (Tex. Crim. App. 2015).

[6] *Please see* the examples at page 18 of Mr. Jones's *Brief*.

> has never included a freedom to disregard these traditional limitations.[7]

The First Amendment overbreadth question is whether a statute restricts, based on its content, a real and substantial amount of protected speech in relation to its legitimate sweep.

The "legitimate sweep" of a statute is the unprotected speech—speech in *Stevens*'s "few limited areas"—that it restricts.[8]

It is not possible to determine whether a statute is overbroad without determining its legitimate sweep, and it is not possible to determine the legitimate sweep of a statute without considering whether it restricts speech in or outside those "limited areas" or recognized categories of historically unprotected speech.

Neither the State in its latest brief nor the Beaumont Court in *Lopez* has described what it contends is the legitimate sweep of section 21.16(b).

The Beaumont Court in *Lopez* found that section 21.16's overbreadth was "insubstantial when judged in relation to the

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[7] *U.S. v. Stevens*, 559 U.S. 460, 468 (2010) (emphasis added, internal edits omitted). Thus whether speech is unprotected from content-based restriction depends only on whether it falls into one of these areas, or categories.

[8] *Please* see Mr. Jones's *Brief* at 34–37.

statute's plainly legitimate sweep," with no discussion of that sweep.[9] The State in that case had not argued that the speech restricted by section 21.16(b) falls within a category of historically unprotected speech.[10] *Stevens* is clear: if speech falls within no category—none of those "few limited areas"—of historically unprotected speech, then the First Amendment does not "permit[] restriction[] upon [its] content" [11]; in other words it is protected speech.

The State in its latest brief begs the core overbreadth question by assuming that the speech that is restricted by section 21.16(b) is *ipso facto* unprotected.

Neither the State nor the Beaumont Court of Appeals offers evidence, as required by the United States Supreme Court,[12] that section 21.16(b)'s novel restriction on speech is part of a long tradition of proscription.

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[9] *Ex parte Lopez*, No. 09-17-00393-CR, 2019 WL _____, at *13.

[10] *Id.* At *4.

[11] *U.S. v. Stevens*, 559 U.S. at 468.

[12] *Please see* Mr. Jones's *Brief* at 38–40.

There is no such evidence. This is a novel restriction. The Court has never held that speech loses protection from content-based criminal restriction because it invades privacy.[13]

The State's latest contribution to the argument to the contrary is *Union Pac. Ry. v. Botsford*, which is about whether a court could order a plaintiff to submit to an independent medical examination,[14] and has nothing to do with restrictions on speech.

Index of Authorities

This brief cites the following authorities:

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[13] *Please see* Mr. Jones's *Brief* at 51–52.

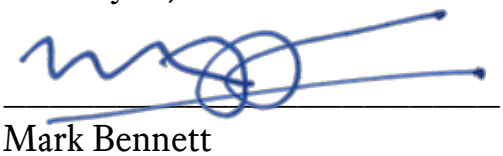
[14] *Union Pac. R. Co. v. Botsford*, 141 U.S. 250 (1891). That procedure was rejected by the Supreme Court in *Botsford* in 1891, but has been explicitly provided for by rule in Texas civil cases since 1998. Tex. R. Civ. Proc. 204.1.

RULES

Certificate of Compliance and Service

A copy of this brief, which contains 847 words, has been delivered to counsel for the State by the efiling system.

Thank you,



Mark Bennett
SBN 00792970
Bennett & Bennett
917 Franklin Street, Fourth Floor
Houston, Texas 77002
713.224.1747
mb@ivi3.com